STATE OF MICHIGAN

COURT OF APPEALS

MARK GEORGE and SALIM GEORGE,

Plaintiffs-Appellants,

v

1078385 ONTARIO LIMITED, d/b/a BOB-LO PARADISE ISLAND RESORT, and d/b/a BOB-LO DEVELOPMENT COMPANY, and 957501 ONTARIO LIMITED, d/b/a GOLDLEAF BUILDERS, and d/b/a AMICONE DESIGN BUILD, INC.,

Defendants-Appellees.

UNPUBLISHED
December 13, 2002

No. 232633
Wayne Circuit Court
LC No. 00-026068-CK

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' separate motions for summary disposition on the ground of forum non conveniens and dismissing the action with prejudice. We affirm the trial court's dismissal, but remand for modification of the order implementing that decision.

In 1997, plaintiffs entered into separate contracts with defendants for the purchase of townhomes. These townhomes were to be constructed as separate units within a single structure on property located in Bois Blanc Island Community on Bob-Lo Island in Ontario, Canada. Defendant 1078385 Ontario Limited (Bob-Lo) apparently developed the project and marketed it, including negotiating the agreements with plaintiffs. Defendant 957501 Ontario Limited (Amicone) constructed the units that plaintiffs purchased. In 1999, after plaintiffs had tendered all monies due under the contracts, but apparently before occupancy, the fire suppression sprinkler system ruptured, causing extensive damage to both units.

Plaintiffs filed suit against defendants in Wayne Circuit Court alleging breach of contract, breach of warranty and negligence. Amicone moved for summary disposition under MCR 2.116(C)(1) alleging lack of personal jurisdiction. Bob-Lo also moved for summary disposition under MCR 2.116(C)(1), but alleged that dismissal was proper on the ground of forum non conveniens. Amicone joined with Bob-Lo in this motion. Following a hearing, the trial court granted the motions for summary disposition on the basis of forum non conveniens and entered

an order dismissing the case with prejudice.[1] Subsequently, plaintiffs filed a motion for reconsideration, which the trial court denied. This appeal ensued.

On appeal, plaintiffs claim that the trial court abused its discretion in dismissing their complaint for forum non conveniens because it did not consider their interest in a Michigan forum and Bob-Lo's business interests in Michigan. We disagree. We review a trial court's decision granting a motion to dismiss on the basis of forum non conveniens for an abuse of discretion. *Miller v Allied Signal, Inc*, 235 Mich App 710, 713; 599 NW2d 110 (1999). "An abuse of discretion is found only in extreme cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.*

When, as here, an alternative jurisdiction is available, a trial court considering dismissal under forum non conveniens should apply the factors outlined in *Cray v General Motors Corp*, 389 Mich 382, 395-396; 207 NW2d 393 (1973), to the facts of the case. The *Cray* factors are divided into three groups: (1) the private interest of the litigant, (2) matters of public interest, and (3) reasonable promptness on the part of the defendants in raising the issue of forum non conveniens. *Id.* at 396. Included in the first group —the private interest of the litigant—are:

> a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
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> b. Ease of access to sources of proof;
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> c. Distance from the situs of the accident or incident which gave rise to the litigation;
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> d. Enforcibility of any judgment obtained;
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> e. Possible harassment of either party;
>
> f. Other practical problems which contribute to the ease, expense and expedition of the trial;
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> g. Possibility of viewing the premises. [*Id.*]

With respect to the second group—matters of public interest—the factors include:

> a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
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> b. Consideration of the state law which must govern the case;
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> c. People who are concerned by the proceeding. [*Id.*]

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[1] The trial court did not rule on Amicone's motion challenging the trial court's personal jurisdiction over it.

Here, in the trial court's opinion accompanying its order, the court referenced the *Cray* factors and made the following observations: that the real property underlying plaintiffs' claims was located in Canada; that it is likely Canadian law will apply both to plaintiffs' tort and contract claims on the basis of where the tortious conduct occurred and the stipulation in the contract, respectively; that defendants are Canadian corporations with their principle places of business in Canada; that many witnesses, including defendants' employees and plaintiffs' expert, are Canadian residents beyond the subpoena power of the court; and that obtaining evidence from these witnesses will likely increase the costs of litigation. The trial court obviously considered the *Cray* factors and, after considering the information before it, concluded that a Canadian forum would be more appropriate. Given the trial court's considerations, the trial court could properly conclude that the forum non conveniens factors weigh in favor of defendants. Moreover, the record reveals that the situs of the controversy, i.e., the island, is equally accessible from either jurisdiction and that defendants' request for dismissal under forum non conveniens were timely. See *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 526; 487 NW2d 475 (1992). The trial court did not abuse its discretion in dismissing the action on the basis of forum non conveniens.

Plaintiffs also argue that the trial court's decision should be reversed because it failed to accord deference to the plaintiff's choice of forum. "A plaintiff's selection of a forum is ordinarily accorded deference." *Manfredi, supra* at 523, citing *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 628-629; 309 NW2d 539 (1981). Plaintiff is correct that the trial court did not acknowledge the deference to be given to a plaintiff's choice of forum; however, we believe that that fact does not constitute an abuse of discretion. Here, the *Cray* factors strongly favor defendants, and therefore plaintiffs' interest in the choice of forums is slight. *Anderson, supra* at 628-629.

Plaintiffs further argue that Bob-Lo's previous use of Michigan courts to resolve disputes and Bob-Lo's extensive marketing in Michigan compel a conclusion that Bob-Lo should be required to answer complaints in Michigan courts. Although we are not well informed regarding prior litigation, it is apparent from what the parties have represented to us that the litigation did not concern actual construction of the Bois Blanc Island Community, but rather concerned a dispute with a minority shareholder or officer of certain entities. Consequently, we find that the prior litigation is not relevant to resolving the issue before us.

Likewise, we find the fact that Bob-Lo focused its marketing in Michigan is of little or no help in determining whether plaintiffs' claims should be litigated here or in Canada because this case has nothing to do with how these townhomes were marketed to plaintiffs. If it did, our analysis would likely be different. In the present case, however, the issues raised in the complaint concern design and construction of the units, not marketing. The events relative to design and construction all took place in Canada and were carried out by persons that reside in Canada. Further, Amicone, which is a construction business, had no involvement in soliciting plaintiffs in Michigan and operates exclusively in Canada. Plaintiffs knowingly agreed to purchase townhomes in Canada from Canadian companies. It should come as no great surprise to plaintiffs that disputes regarding the actual building of their townhomes might most conveniently be litigated in Canada. Under these circumstances, we find that plaintiffs' claim of unfairness in requiring it to litigate its disputes in Canadian courts is without merit.

Nevertheless, we do find merit in plaintiff's assertion that the trial court improperly ordered dismissal in this case with prejudice. Dismissal with prejudice means that all issues have been resolved and further litigation is barred. *Rogers v Colonial Fed Sav & Loan Ass'n of Grosse Pointe Woods*, 405 Mich 607, 633; 275 NW2d 499 (1979) (Ryan, J., dissenting) ("A dismissal with prejudice operates as an adjudication on the merits and will bar a subsequent action on the same matter."); *Edgar v Buck*, 65 Mich 356; 32 NW 644 (1887); *Wilson v Knight-Ridder Newspapers, Inc*, 190 Mich App 277, 279; 475 NW2d 388 (1991). Here, the only issue that the trial court decided was that the case was better tried in a Canadian court. Consequently, dismissal with prejudice was inappropriate.

Finally, plaintiffs argue that the affidavits submitted with Bob-Lo's motion were insufficient. Affidavits submitted in support of motions must be made on personal knowledge and show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated. MCR 2.119(B)(1)(a), (c). Although the affidavits that plaintiffs question did not comply fully with MCR 2.119(B), absent a showing of prejudice resulting from the noncompliance, any error is harmless. *Baker v DEC Int'l*, 218 Mich App 248, 262; 553 NW2d 667 (1996), aff'd in part, rev'd in part on other grounds 458 Mich 247 (1998). Because the affidavits showed first-hand knowledge of the facts alleged and competence to testify regarding those facts, any error was harmless.

Affirmed in part and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra